

102      FEDERAL RULES OF CRIMINAL PROCEDURE

more than one year after sentence was imposed, when the defendant's substantial assistance involved information known to the defendant within one year after sentencing, but no motion was filed because the significance or usefulness of the information was not apparent until after the one-year period had elapsed. Another version of Rule 35, which does not include this amendment, is being published simultaneously in a separate pamphlet.

1            **~~Rule 41. Search and Seizure~~**

2            **~~(a) Authority to Issue Warrant.~~** Upon the request of a  
3            federal law enforcement officer or an attorney for the  
4            government, a search warrant authorized by this rule may  
5            be issued (1) by a federal magistrate judge, or a state  
6            court of record within the federal district, for a search of  
7            property or for a person within the district and (2) by a  
8            federal magistrate judge for a search of property or for a  
9            person either within or outside the district if the property  
10           or person is within the district when the warrant is sought  
11           but might move outside the district before the warrant is  
12           executed.

13 ~~(b) Property or Persons Which May be Seized With a~~

14 ~~Warrant. A warrant may be issued under this rule to~~

15 ~~search for and seize any (1) property that constitutes~~

16 ~~evidence of the commission of a criminal offense; or (2)~~

17 ~~contraband, the fruits of crime, or things otherwise~~

18 ~~criminally possessed; or (3) property designed or intended~~

19 ~~for use or which is or has been used as the means of~~

20 ~~committing a criminal offense; or (4) person for whose~~

21 ~~arrest there is probable cause, or who is unlawfully~~

22 ~~restrained.~~

23 ~~(c) Issuance and Contents.~~

24 ~~—(1) Warrant Upon Affidavit. A warrant other than a~~

25 ~~warrant upon oral testimony under paragraph (2) of~~

26 ~~this subdivision shall issue only on an affidavit or~~

27 ~~affidavits sworn to before the federal magistrate~~

28 ~~judge or state judge and establishing the grounds for~~

104      FEDERAL RULES OF CRIMINAL PROCEDURE

29                    ~~issuing the warrant. If the federal magistrate judge or~~  
30                    ~~state judge is satisfied that grounds for the~~  
31                    ~~application exist or that there is probable cause to~~  
32                    ~~believe that they exist, that magistrate judge or state~~  
33                    ~~judge shall issue a warrant identifying the property or~~  
34                    ~~person to be seized and naming or describing the~~  
35                    ~~person or place to be searched. The finding of~~  
36                    ~~probable cause may be based upon hearsay evidence~~  
37                    ~~in whole or in part. Before ruling on a request for a~~  
38                    ~~warrant the federal magistrate judge or state judge~~  
39                    ~~may require the affiant to appear personally and may~~  
40                    ~~examine under oath the affiant and any witnesses the~~  
41                    ~~affiant may produce, provided that such proceeding~~  
42                    ~~shall be taken down by a court reporter or recording~~  
43                    ~~equipment and made part of the affidavit. The~~  
44                    ~~warrant shall be directed to a civil officer of the~~

45           ~~United States authorized to enforce or assist in~~  
46           ~~enforcing any law thereof or to a person so~~  
47           ~~authorized by the President of the United States. It~~  
48           ~~shall command the officer to search, within a~~  
49           ~~specified period of time not to exceed 10 days, the~~  
50           ~~person or place named for the property or person~~  
51           ~~specified. The warrant shall be served in the daytime,~~  
52           ~~unless the issuing authority, by appropriate provision~~  
53           ~~in the warrant, and for reasonable cause shown,~~  
54           ~~authorized its execution at times other than daytime.~~  
55           ~~It shall designate a federal magistrate judge to whom~~  
56           ~~it shall be returned.~~

57       ~~— (2) Warrant Upon Oral Testimony.~~

58       ~~— (A) General Rule. If the circumstances make it~~  
59           ~~reasonable to dispense, in whole or in part, with~~  
60           ~~a written affidavit, a Federal magistrate judge~~

106      FEDERAL RULES OF CRIMINAL PROCEDURE

61                    ~~may issue a warrant based upon sworn~~  
62                    ~~testimony communicated by telephone or other~~  
63                    ~~appropriate means, including facsimile~~  
64                    ~~transmission.~~

65                    ~~———— (B) *Application.* The person who is requesting the~~  
66                    ~~warrant shall prepare a document to be known~~  
67                    ~~as a duplicate original warrant and shall read~~  
68                    ~~such duplicate original warrant, verbatim, to the~~  
69                    ~~Federal magistrate judge. The Federal~~  
70                    ~~magistrate judge shall enter, verbatim, what is~~  
71                    ~~so read to such magistrate judge on a document~~  
72                    ~~to be known as the original warrant. The~~  
73                    ~~Federal magistrate judge may direct that the~~  
74                    ~~warrant be modified.~~

75                    ~~———— (C) *Issuance.* If the Federal magistrate judge is~~  
76                    ~~satisfied that the circumstances are such as to~~

77                   ~~make it reasonable to dispense with a written~~  
78                   ~~affidavit and that grounds for the application~~  
79                   ~~exist or that there is probable cause to believe~~  
80                   ~~that they exist, the Federal magistrate judge~~  
81                   ~~shall order the issuance of a warrant by directing~~  
82                   ~~the person requesting the warrant to sign the~~  
83                   ~~Federal magistrate judge's name on the~~  
84                   ~~duplicate original warrant. The Federal~~  
85                   ~~magistrate judge shall immediately sign the~~  
86                   ~~original warrant and enter on the face of the~~  
87                   ~~original warrant the exact time when the warrant~~  
88                   ~~was ordered to be issued. The finding of~~  
89                   ~~probable cause for a warrant upon oral~~  
90                   ~~testimony may be based on the same kind of~~  
91                   ~~evidence as is sufficient for a warrant upon~~  
92                   ~~affidavit.~~

108      FEDERAL RULES OF CRIMINAL PROCEDURE

93      ~~———— (D) *Recording and Certification of Testimony.*~~

94                      ~~When a caller informs the Federal magistrate~~  
95                      ~~judge that the purpose of the call is to request a~~  
96                      ~~warrant, the Federal magistrate judge shall~~  
97                      ~~immediately place under oath each person~~  
98                      ~~whose testimony forms a basis of the application~~  
99                      ~~and each person applying for that warrant. If a~~  
100                     ~~voice recording device is available, the Federal~~  
101                     ~~magistrate judge shall record by means of such~~  
102                     ~~device all of the call after the caller informs the~~  
103                     ~~Federal magistrate judge that the purpose of the~~  
104                     ~~call is to request a warrant. Otherwise a~~  
105                     ~~stenographic or longhand verbatim record shall~~  
106                     ~~be made. If a voice recording device is used or~~  
107                     ~~a stenographic record made, the Federal~~  
108                     ~~magistrate judge shall have the record~~

109                   ~~transcribed, shall certify the accuracy of the~~  
 110                   ~~transcription, and shall file a copy of the original~~  
 111                   ~~record and the transcription with the court. If a~~  
 112                   ~~longhand verbatim record is made, the Federal~~  
 113                   ~~magistrate judge shall file a signed copy with the~~  
 114                   ~~court.~~

115           ~~———— (E) *Contents.* The contents of a warrant upon oral~~  
 116                   ~~testimony shall be the same as the contents of a~~  
 117                   ~~warrant upon affidavit.~~

118           ~~———— (F) *Additional Rule for Execution.* The person who~~  
 119                   ~~executes the warrant shall enter the exact time~~  
 120                   ~~of execution on the face of the duplicate original~~  
 121                   ~~warrant.~~

122           ~~———— (G) *Motion to Suppress Precluded.* Absent a finding~~  
 123                   ~~of bad faith, evidence obtained pursuant to a~~  
 124                   ~~warrant issued under this paragraph is not~~



110      FEDERAL RULES OF CRIMINAL PROCEDURE

125                    ~~subject to a motion to suppress on the ground~~  
126                    ~~that the circumstances were not such as to make~~  
127                    ~~it reasonable to dispense with a written affidavit.~~

128      ~~(d) Execution and Return with Inventory.~~ The officer  
129                    ~~taking property under the warrant shall give to the person~~  
130                    ~~from whom or from whose premises the property was~~  
131                    ~~taken a copy of the warrant and a receipt for the property~~  
132                    ~~taken or shall leave the copy and receipt at the place from~~  
133                    ~~which the property was taken. The return shall be made~~  
134                    ~~promptly and shall be accompanied by a written inventory~~  
135                    ~~of any property taken. The inventory shall be made in the~~  
136                    ~~presence of the applicant for the warrant and the person~~  
137                    ~~from whose possession or premises the property was~~  
138                    ~~taken, if they are present, or in the presence of at least~~  
139                    ~~one credible person other than the applicant for the~~  
140                    ~~warrant or the person from whose possession or premises~~

141 ~~the property was taken, and shall be verified by the~~  
 142 ~~officer. The federal magistrate judge shall upon request~~  
 143 ~~deliver a copy of the inventory to the person from whom~~  
 144 ~~or from whose premises the property was taken and to~~  
 145 ~~the applicant for the warrant.~~

146 **(c) ~~Motion for Return of Property.~~** A person aggrieved by  
 147 ~~an unlawful search and seizure or by the deprivation of~~  
 148 ~~property may move the district court for the district in~~  
 149 ~~which the property was seized for the return of the~~  
 150 ~~property on the ground that such person is entitled to~~  
 151 ~~lawful possession of the property. The court shall receive~~  
 152 ~~evidence on any issue of fact necessary to the decision of~~  
 153 ~~the motion. If the motion is granted, the property shall be~~  
 154 ~~returned to the movant, although reasonable conditions~~  
 155 ~~may be imposed to protect access and use of the property~~  
 156 ~~in subsequent proceedings. If a motion for return of~~

112      FEDERAL RULES OF CRIMINAL PROCEDURE

157            ~~property is made or comes on for hearing in the district of~~  
158            ~~trial after an indictment or information is filed, it shall be~~  
159            ~~treated also as a motion to suppress under Rule 12.~~

160            ~~(f) **Motion to Suppress.** A motion to suppress evidence may~~  
161            ~~be made in the court of the district of trial as provided in~~  
162            ~~Rule 12.~~

163            ~~(g) **Return of Papers to Clerk.** The federal magistrate judge~~  
164            ~~before whom the warrant is returned shall attach to the~~  
165            ~~warrant a copy of the return, inventory and all other~~  
166            ~~papers in connection therewith and shall file them with~~  
167            ~~the clerk of the district court for the district in which the~~  
168            ~~property was seized.~~

169            ~~(h) **Scope and Definition.** This rule does not modify any act,~~  
170            ~~inconsistent with it, regulating search, seizure and the~~  
171            ~~issuance and execution of search warrants in~~  
172            ~~circumstances for which special provision is made. The~~

173 term "property" is used in this rule to include documents;  
174 books, papers and any other tangible objects. The term  
175 "daytime" is used in this rule to mean the hours from 6:00  
176 a.m. to 10:00 p.m. according to local time. The phrase  
177 "federal law enforcement officer" is used in this rule to  
178 mean any government agent, other than an attorney for  
179 the government as defined in Rule 54(c), who is engaged  
180 in the enforcement of the criminal laws and is within any  
181 category of officers authorized by the Attorney General  
182 to request the issuance of a search warrant.

183 **Rule 41. Search and Seizure**

184 **(a) Scope and Definitions.**

185 **(4) Scope.** This rule does not modify any statute  
186 regulating search or seizure, or the issuance and  
187 execution of a search warrant in special  
188 circumstances.

114      FEDERAL RULES OF CRIMINAL PROCEDURE

189            **(5) Definitions.** The following definitions apply under  
190            this rule:

191            **(A) "Property"** includes documents, books, papers,  
192            other tangible objects, and information.

193            **(B) "Daytime"** means the hours between 6:00 a.m.  
194            and 10:00 p.m. according to local time.

195            **(C) "Federal law enforcement officer"** means a  
196            government agent (other than an attorney for  
197            the government) who is engaged in the  
198            enforcement of the criminal laws and is within  
199            any category of officers authorized by the  
200            Attorney General to request the issuance of a  
201            search warrant.

202            **(b) Authority to Issue a Warrant.** At the request of a  
203            federal law enforcement officer or an attorney for the  
204            government:

205           (1) a magistrate judge having authority in the district —  
 206                     or if none is reasonably available, a judge of a state  
 207                     court of record in the district — may issue a warrant  
 208                     to search for and seize, or covertly observe on a  
 209                     noncontinuous basis, a person or property located  
 210                     within the district; and

211           (2) a magistrate judge may issue a warrant for a person  
 212                     or property outside the district if the person or  
 213                     property is located within the district when the  
 214                     warrant is issued but might move outside the district  
 215                     before the warrant is executed.

216           (c) Persons or Property Subject to Search or Seizure. A  
 217                     warrant may be issued for any of the following:

218                     (1) evidence of the commission of a crime;  
 219                     (2) contraband, fruits of crime, or other items illegally  
 220                     possessed;

116 FEDERAL RULES OF CRIMINAL PROCEDURE

221 (3) property designed for use, intended for use, or used  
222 in committing a crime; or

223 (4) a person to be arrested or a person who is unlawfully  
224 restrained.

225 **(d) Obtaining a Warrant.**

226 **(1) Probable Cause.** After receiving an affidavit or other  
227 information, a magistrate judge or a judge of a state  
228 court of record must issue the warrant if there is  
229 probable cause to search for and seize, or covertly  
230 observe, a person or property under Rule 41(c).

231 **(2) Requesting a Warrant in the Presence of a Judge.**

232 **(A) Warrant on an Affidavit.** When a federal law  
233 enforcement officer or an attorney for the  
234 government presents an affidavit in support of a  
235 warrant, the judge may require the affiant to

236 appear personally and may examine under oath  
237 the affiant and any witness the affiant produces.

238 (B) Warrant on Sworn Testimony. The judge may  
239 wholly or partially dispense with a written  
240 affidavit and base a warrant on sworn testimony  
241 if doing so is reasonable under the  
242 circumstances.

243 (C) Recording Testimony. Testimony taken in  
244 support of a warrant must be recorded by a  
245 court reporter or by a suitable recording device,  
246 and the judge must file the transcript or  
247 recording with the clerk, along with any  
248 affidavit.

249 (3) Requesting a Warrant by Telephonic or Other  
250 Means.



118      FEDERAL RULES OF CRIMINAL PROCEDURE

251                    (A) *In General.* A magistrate judge may issue a  
252                                    warrant based on information communicated by  
253                                    telephone or other appropriate means, including  
254                                    facsimile transmission.

255                    (B) *Recording Testimony.* Upon learning that an  
256                                    applicant is requesting a warrant, a magistrate  
257                                    judge must:

258                                    (i) place under oath the applicant and any  
259                                    person on whose testimony the application  
260                                    is based; and

261                                    (ii) make a verbatim record of the conversation  
262                                    with a suitable recording device, if  
263                                    available, or by court reporter, or in  
264                                    writing.

265                    (C) *Certifying Testimony.* The magistrate judge  
266                                    must have any recording or court reporter's

267 notes transcribed, certify the transcription's  
268 accuracy, and file a copy of the record and the  
269 transcription with the clerk. Any written  
270 verbatim record must be signed by the  
271 magistrate judge and filed with the clerk.

272 (D) *Suppression Limited.* Absent a finding of bad  
273 faith, evidence obtained from a warrant issued  
274 under Rule 41(d)(3)(A) is not subject to  
275 suppression on the ground that issuing the  
276 warrant in that manner was unreasonable under  
277 the circumstances.

278 **(e) Issuing the Warrant.**

279 **(1) *In General.*** The magistrate judge or a judge of a  
280 state court of record must issue the warrant to an  
281 officer authorized to execute it and deliver a copy to  
282 the district clerk.

120 FEDERAL RULES OF CRIMINAL PROCEDURE

- 283           **(2) Contents of the Warrant.** The warrant must identify  
284           the person or property to be searched or covertly  
285           observed, identify any person or property to be  
286           seized, and designate the magistrate judge to whom  
287           the warrant must be returned. The warrant must  
288           command the officer to:  
289           **(A) execute the warrant within a specified time no**  
290           longer than 10 days;  
291           **(B) execute the warrant during the daytime, unless**  
292           the judge for good cause expressly authorizes  
293           execution of the warrant at another time; and  
294           **(C) return the warrant to the magistrate judge**  
295           designated in the warrant.  
296           **(3) Warrant by Telephonic or Other Means.** If a  
297           magistrate judge decides to issue a warrant under

298           Rule 41(d)(3)(A), the following additional  
299           procedures apply:

300           (A) *Preparing a Proposed Duplicate Original*  
301           *Warrant.* The applicant must prepare a  
302           "proposed duplicate original warrant" and must  
303           read or otherwise transmit the contents of that  
304           document verbatim to the magistrate judge.

305           (B) *Preparing an Original Warrant.* The  
306           magistrate judge must enter the contents of the  
307           proposed duplicate original warrant into an  
308           original warrant.

309           (C) *Modifications.* The magistrate judge may direct  
310           the applicant to modify the proposed duplicate  
311           original warrant. In that case, the judge must  
312           also modify the original warrant.

122      FEDERAL RULES OF CRIMINAL PROCEDURE

313                    (D) *Signing the Original Warrant and the Duplicate*  
314                    *Original Warrant.* Upon determining to issue  
315                    the warrant, the magistrate judge must  
316                    immediately sign the original warrant, enter on  
317                    its face the exact time when it is issued, and  
318                    direct the applicant to sign the judge's name on  
319                    the duplicate original warrant.

320                    **(f) *Executing and Returning the Warrant.***

321                    **(1) *Notation of Time.*** The officer executing the warrant  
322                    must enter on the face of the warrant the exact date  
323                    and time it is executed.

324                    **(2) *Inventory.*** An officer executing the warrant must  
325                    also prepare and verify an inventory of any property  
326                    seized and must do so in the presence of:

327                    (A) another officer, and

328           (B) the person from whom, or from whose  
329                     premises, the property was taken, if present; or

330           (C) if either of these persons is not present, at least  
331                     one other credible person.

332           **(3) Receipt.** The officer executing the warrant must:

333           (A) give a copy of the warrant and a receipt for the  
334                     property taken to the person from whom, or  
335                     from whose premises, the property was taken;  
336                     or

337           (B) leave a copy of the warrant and receipt at the  
338                     place where the officer took the property.

339           **(4) Return.** The officer executing the warrant must  
340                     promptly return it — together with a copy of the  
341                     inventory — to the magistrate judge designated on  
342                     the warrant. The judge must, on request, give a copy  
343                     of the inventory to the person from whom or from

124 FEDERAL RULES OF CRIMINAL PROCEDURE

344 whose premises the property was taken and to the  
345 applicant for the warrant.

346 **(5) Covert Observation of a Person or Property.** If the  
347 warrant authorizes a covert observation of a person  
348 or property, the government must within 7 days  
349 deliver a copy to the person who was observed or  
350 whose property was observed. Upon the  
351 government's motion, the court may on one or more  
352 occasions for good cause extend the time to deliver  
353 the warrant for a reasonable period.

354 **(g) Motion to Return Property.** A person aggrieved by an  
355 unlawful search and seizure of property or by the  
356 deprivation of property may move for the property's  
357 return. The motion must be filed in the district where the  
358 property was seized. The court must receive evidence on  
359 any factual issue necessary to decide the motion. If it

360 grants the motion, the court must return the property to  
 361 the movant, but may impose reasonable conditions to  
 362 protect access to the property and its use in later  
 363 proceedings.

364 **(h) Motion to Suppress.** A defendant may move to suppress  
 365 evidence in the court where the trial will occur, as  
 366 Rule 12 provides.

367 **(i) Forwarding Papers to the Clerk.** The magistrate judge  
 368 to whom the warrant is returned must attach to the  
 369 warrant a copy of the return, inventory, and all other  
 370 related papers and must deliver them to the clerk in the  
 371 district where the property was seized.

#### COMMITTEE NOTE

The language of Rule 41 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.



Rule 41 has been completely reorganized to make it easier to read and apply its key provisions. Additionally, several substantive changes have been made.

First, revised Rule 41 now explicitly includes procedural guidance for conducting covert entries and observations. Federal law enforcement officers have obtained warrants, based upon probable cause, to make a covert search — not for the purpose of seizing property but instead to observe and record information. Those observations may assist officers in confirming information already in the possession of law enforcement officials and in turn may assist in deciding whether, and by what means, to pursue further investigation. For example, agents may seek a warrant to enter the office of suspected conspirators to determine the layout of the office for purposes of seeking additional warrants to establish surveillance points or to determine the number and identity of the participants.

Currently, Rule 41(a) recognizes the possibility that a search may occur of property without any subsequent seizure taking place. But the remainder of the rule addresses only traditional searches where the objective is the seizure of tangible property. Nonetheless, the courts have approved the authority of law enforcement agencies to search for and seize intangible evidence or information. *See, e.g., Silverman v. United States*, 365 U.S. 505 (1961) (conversations overheard by microphone touching heating duct); *Berger v. New York*, 388 U.S. 41 (1967) (wiretap of conversations); *United States v. Knotts*, 460 U.S. 276 (1983) (beeper); *United States v. Karo*, 468 U.S. 705 (1984) (beeper); *United States v. Biasucci*, 786 F.2d 504 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986) (visual information gathered by video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance of safe house); *United States v. Taborda*, 635

F.2d 131 (2d Cir. 1980) (warrant required to view private area through telescope).

Although the foregoing cases involved Fourth Amendment intrusions because they involved monitoring activities within the defendant's zone of reasonable expectation of privacy, they did not explicitly address the authority of agents to make covert entries. There is authority for the view, however, that both the Constitution and Rule 41 are broad enough to authorize a "surreptitious entry" warrant — for the purpose of observing tangible and intangible evidence. *United States v. Villegas*, 899 F.2d 1334, 1336 (2d Cir. 1990), citing *Dalia v. United States*, 441 U.S. 238 (1979) and *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986), citing *United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977) (Rule 41 is not limited to tangible items). See also *United States v. Freitas*, 856 F.2d 1425 (9th Cir. 1988) (on remand, court held that good faith exception to exclusionary rule applied; officers had reasonably relied on search warrant, based on probable cause, to surreptitiously search for information; failure to provide notice under Rule 41(d) was technical error). See also *United States v. Villegas*, *supra*, 899 F.2d at 1334-35 (2d Cir. 1990) (approving search warrant for "sneak and peek" entry of defendant's buildings; court noted that Rule 41 does not define the extent of court's power to issue search warrant). In some respects, the covert entry search for a noncontinuous observation is less intrusive than other types of conventional intrusions. As the court in *United States v. Villegas*, *supra*, at 1337 observed:

[A covert entry search] is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. It is less

intrusive than a wiretap or video camera surveillance because the [covert entry] physical search is of relatively short duration,...and produces information as of a given moment, whereas the electronic surveillance is ongoing and indiscriminate, gathering in any activities within its mechanical focus. Thus, several of the limitations on wiretap or electronic surveillance, such as duration and minimization, would be superfluous in the context [of a covert entry search].

The Committee agrees that Rule 41 does not define the limits of the Fourth Amendment, and is cognizant that the Supreme Court has upheld the validity of covert entries with delayed notification, *see, e.g., Dalia v. United States*, 441 U.S. 238, 247-248 (1979) ("The Fourth Amendment does not prohibit per se covert entry performed for the purposes of installing otherwise legal electronic bugging equipment"); *United States v. Donovan*, 429 U.S. 428, 429 n. 19 (1977). The Committee also considered the argument that it would be premature to amend Rule 41 in order to codify the views of only two circuits that have expressly addressed the type of covert search addressed in the amendment, and that it would be better to await further caselaw developments. Nonetheless, the Committee believed that on balance, it would be beneficial to address the procedures (in particular the notice provisions) for covert entry searches in the Rule itself. Accordingly, revised Rule 41(b) recognizes the authority of officers to seek a warrant for the purpose of covertly observing — on a noncontinuous basis — a person or property. These types of intrusions are to be distinguished from other continuous monitoring or observations that would be governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by Title I of the 1968 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States*

*v. Biasucci, supra* (use of video camera); *United States v. Torres, supra* (television surveillance).

Under revised Rule 41(e)(2), the warrant must describe the person or property to be covertly observed.

Revised Rule 41(f)(5) explicitly requires that if a covert entry search warrant has been issued, the government must provide notice to the person whose property was searched within 7 days of the execution. The time for providing notice may be extended for good cause for a reasonable time, on one or more occasions. This notice requirement parallels the notice requirement for the traditional search but makes allowance for the fact that the functions of covert entry searches would be frustrated by prior or contemporaneous notice of the entry. *See, e.g., United States v. Villegas, supra; United States v. Freitas, supra.*

The second substantive change is in revised Rule 41(b)(1). That provision requires law enforcement personnel to first attempt to obtain a warrant from a federal judicial officer. If none is reasonably available, they may seek a warrant from a state judge. This preference parallels similar requirements in Rules 3, 4, and Rule 5. The Committee understands that this change may have a dramatic impact in some districts, which experience a heavy criminal caseload and rely routinely on state judges for assistance. That practice seems to be the exception rather than the general rule, however. On balance, it is important to state a clear preference that in the normal situation federal judicial authorities should be involved in pretrial processing of federal prosecutions. The amendment is not intended to create any new ground for contesting the validity of a search warrant or seeking

to suppress evidence on the ground that it was issued by the "wrong" judge.

Current Rule 41(c)(1), which refers to the fact that hearsay evidence may be used to support probable cause, has been deleted. That language was added to the rule in 1972, apparently to reflect emerging federal case law. *See* Advisory Committee Note to 1972 Amendments to Rule 41 (citing cases). Similar language was added to Rule 4 in 1974 and was included in the promulgation of Rule 5.1 in 1972. In the intervening years, however, the case law has become perfectly clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Furthermore, the limited reference to hearsay evidence was misleading to the extent that it might have suggested that other forms of inadmissible evidence could not be considered. For example, the rule made no reference to considering a defendant's prior criminal record, which clearly may be considered in deciding whether probable cause exists. *See, e.g., Brinegar v. United States*, 338 U.S. 160 (1949) (officer's knowledge of defendant's prior criminal activity). Rather than address that issue, or any other similar issues, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly provides that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases, . . . issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

Finally, two minor changes have been made to Rule 41(e), which governs the procedures for issuing warrants under the rule. First, Rule 41(e)(1) requires that after issuing a warrant, the magistrate judge or state judicial officer must deliver a copy of the warrant to the district clerk. Further, under Rule 41(e)(3), the warrant must designate the magistrate judge to whom the warrant must be returned. The Committee believed that these changes would provide for more efficient processing of warrants, particularly in those instances where a state court judge has issued the warrant.

### REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 41 is one of those rules. This version of Rule 41 includes a significant amendment concerning the authority of a court to approve search warrants for covert entries for the purpose of making observations. Another version of Rule 41, which does not include this provision, is being published simultaneously in a separate pamphlet.

- 1        **~~Rule 43. Presence of the Defendant~~**
- 2        **~~(a) Presence Required.~~** The defendant shall be present at
- 3                ~~the arraignment, at the time of the plea, at every stage of~~
- 4                ~~the trial including the impaneling of the jury and the~~

132      FEDERAL RULES OF CRIMINAL PROCEDURE

5            ~~return of the verdict, and at the imposition of sentence;~~  
6            ~~except as otherwise provided by this rule.~~

7            ~~(b) Continued Presence Not Required.~~ The further  
8            ~~progress of the trial to and including the return of the~~  
9            ~~verdict, and the imposition of sentence, will not be~~  
10           ~~prevented and the defendant will be considered to have~~  
11           ~~waived the right to be present whenever a defendant,~~  
12           ~~initially present at trial, or having pleaded guilty or nolo~~  
13           ~~contendere,~~

14           ~~— (1) is voluntarily absent after the trial has commenced~~  
15           ~~(whether or not the defendant has been informed by~~  
16           ~~the court of the obligation to remain during the trial);~~

17           ~~— (2) in a noncapital case, is voluntarily absent at the~~  
18           ~~imposition of sentence, or~~

19           ~~— (3) after being warned by the court that disruptive~~  
20           ~~conduct will cause the removal of the defendant from~~

21           ~~the courtroom, persists in conduct which is such as~~  
22           ~~to justify exclusion from the courtroom.~~

23       ~~(c) Presence Not Required.~~ A defendant need not be  
24       ~~present:—~~

25       ~~—(1) when represented by counsel and the defendant is an~~  
26       ~~organization, as defined in 18 U.S.C. § 18;~~

27       ~~—(2) when the offense is punishable by fine or by~~  
28       ~~imprisonment for not more than one year or both,~~  
29       ~~and the court, with the written consent of the~~  
30       ~~defendant, permits arraignment, plea, trial, and~~  
31       ~~imposition of sentence in the defendant's absence;~~

32       ~~—(3) when the proceeding involves only a conference or~~  
33       ~~hearing upon a question of law; or~~

34       ~~—(4) when the proceeding involves a reduction or~~  
35       ~~correction of sentence under Rule 35(b) or (c) or 18~~  
36       ~~U.S.C. § 3582(c).~~



134      FEDERAL RULES OF CRIMINAL PROCEDURE

37      **Rule 43. Defendant's Presence**

38      **(a) When Required.** Unless this rule, Rule 5, or Rule 10  
39      provides otherwise, the defendant must be present at:

40      (1) the initial appearance, initial arraignment, and plea;

41      (2) every trial stage, including jury impanelment and the  
42      return of the verdict; and

43      (3) sentencing.

44      **(b) When Not Required.** A defendant need not be present  
45      under any of the following circumstances:

46      (1) *Organizational Defendant.* The defendant is an  
47      organization represented by counsel who is present.

48      (2) *Misdemeanor Offense.* The offense is punishable by  
49      fine or by imprisonment for not more than one year,  
50      or both, and with the defendant's written consent,  
51      the court permits arraignment, plea, trial, and  
52      sentencing to occur in the defendant's absence.

53           **(3) Conference or Hearing on a Legal Question.** The  
54                   proceeding involves only a conference or hearing on  
55                   a question of law.

56           **(4) Sentence Correction.** The proceeding involves the  
57                   correction or reduction of sentence under Rule 35  
58                   or 18 U.S.C. § 3582(c).

59       **(c) Waiving Continued Presence.**

60           **(1) In General.** A defendant who was initially present at  
61                   trial, or who had pleaded guilty or nolo contendere,  
62                   waives the right to be present under the following  
63                   circumstances:

64                   **(A) when the defendant is voluntarily absent after**  
65                   the trial has begun, regardless of whether the  
66                   court informed the defendant of an obligation to  
67                   remain during trial;

136 FEDERAL RULES OF CRIMINAL PROCEDURE

68 (B) in a noncapital case, when the defendant is  
69 voluntarily absent during sentencing; or

70 (C) when the court warns the defendant that it will  
71 remove the defendant from the courtroom for  
72 disruptive behavior, but the defendant persists in  
73 conduct that justifies removal from the  
74 courtroom.

75 (2) *Waiver's Effect.* If the defendant waives the right to  
76 be present under this rule, the trial may proceed to  
77 completion, including the verdict's return and  
78 sentencing, during the defendant's absence.

**COMMITTEE NOTE**

The language of Rule 43 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The first substantive change is reflected in Rule 43(a), which recognizes several exceptions to the requirement that a defendant

must be present in court for all proceedings. In addition to referring to exceptions that might exist in Rule 43 itself, the amendment recognizes that a defendant need not be present when the court has permitted video teleconferencing procedures under Rules 5 and 10 or when the defendant has waived the right to be present for the arraignment under Rule 10. Second, by inserting the word "initial" before "arraignment," revised Rule 43(a)(1) reflects the view that a defendant need not be present for subsequent arraignments based upon a superseding indictment.

The Rule has been reorganized to make it easier to read and apply; revised Rule 43(b) is former Rule 43(c).

#### **REPORTER'S NOTES**

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 43 is one of those rules. This version of Rule 43 recognizes substantive amendments to Rules 5, 5.1, and 10, which in turn permit video teleconferencing of proceedings, where the defendant would not be personally present in the courtroom. Another version of Rule 43, which includes only style changes is being published simultaneously in a separate pamphlet.